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6. Intoxicating Liquors (§ 224*)—Burden of Proof; Possession of Liquor.—An employee on a train of an interstate carrier passing through the state did not have the burden, under Acts 1919, c. 146, to prove that he was on an interstate journey through the state; although ardent spirits in excess of one quart were found in his possession, the evidence for the state showing that the liquor was found upon the train itself.

Sims, J., dissenting.

[Ed. Note.—For other cases, see 8 Va.-W. Va. Enc. Dig. 33.]

Error to Corporation Court of Roanoke.

Martin and White were convicted for violation of the Prohibition Law, and bring error. Reversed.

Hoge & Darnall and *Hirston & Hirston*, all of Roanoke, for plaintiffs in error.

Jno. R. Saunders, Atty Gen., and *J. D. Hank, Jr., Asst. Atty. Gen.*, for the Commonwealth.

WASHINGTON-VIRGINIA RY. CO. v. DEAHL.

Sept. 17, 1919

[100 S. E. 840.]

1. Evidence (§ 244 (15)*—Admissions by Carrier's Claim Agent.—Where a passenger on an electric railway car which collided with a truck claimed that she was injured as the result of the collision, testimony that the claim agent of the railway company who investigated the passenger's claim and the circumstances surrounding the accident told the passenger that the controller was broken, and that was the reason the motorman could not stop the car, is admissible, despite the rule against hearsay; the declaration being within the scope of the claim agent's authority.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 339.]

2. Appeal and Error (§ 236 (2)*—Objections in Lower Court; Variance Waived.—In an action by a passenger injured when an electric railway car collided with a motortruck, where the declaration alleged that the company ran its train negligently without having the same under proper control, and without a timely application of the brakes, defendant cannot complain of the admission over objection of evidence that the controller was broken, and that that was the reason the motorman could not stop the car, for the court might readily have required the amendment to the declaration and no continuance was requested on the ground of surprise.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 563; 13 Va.-W. Va. Enc. Dig. 484.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

3. Evidence (§ 123 (11)*).—Declarations as *Res Gestæ*.—In an action by a passenger for injuries received when the electric railway car on which she was riding collided with a motor truck, testimony by other passengers, that immediately after the collision the motorman stated to the driver of the truck that this was the third time the driver had tried to pass in front of the car and that he had gotten him, held admissible as part of the *res gestæ*.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 817.]

4. Damages (§ 171*).—Admissibility of Evidence of Plaintiff's Poverty.—In an action for personal injuries received by a plaintiff hurt when the electric car on which she was riding collided with a motor truck, testimony as to poverty of plaintiff is not admissible for any purpose, and cannot be received even to show her mental suffering due to her alleged physical inability to make a living and her lack of funds.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 850.]

5. Trial (§ 79*).—Objection to Evidence; Waiver by Failure to Repeat.—Where, in action for injuries to passenger, defendant strenuously objected to admission of testimony as to poverty of plaintiff, defendant did not waive the objection because he permitted plaintiff to allude on cross-examination to her poverty without at the moment objecting to the allusions.

6. Appeal and Error (§ 1053 (2)*).—Harmless Error; Cure of Error by Instruction.—Error in the admission of improper evidence may be cured by a proper instruction to disregard it.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 745.]

7. Appeal and Error (§ 1053 (4)*).—Harmless Error; Cure of Error by Instruction.—In an action by a passenger for injuries, where testimony as to her poverty was improperly admitted, held, that the error was not cured by an instruction that the jury could not allow the passenger more damages than would compensate her for the injuries actually received, and that if her present condition was due in part to hysteria or previous trouble they should take into consideration the existence of such diseases.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 745.]

8. Appeal and Error (§ 1050 (1)*).—Admission of Evidence Prejudicial Error Where Verdict Excessive.—In a passenger's action for injuries, admission of testimony as to her poverty was prejudicial error, where it was contended that she underwent mental suffering because of her physical inability to earn her living, coupled with her poverty, and defendant attacked the verdict of \$5,000 as excessive.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 593.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Error to Circuit Court, Alexandria County.

Action by Miss Anna E. Deahl against the Washington-Virginia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Moore, Keith, McCandlish & Hall and *Jno. S. Barbour*, all of Fairfax, for plaintiff in error.

Henry I. Quinn, of Washington, D. C., and *Leo P. Harlow* and *J. K. M. Norton*, both of Alexandria, for defendant in error.

HENRY'S EX'X v. PAYNE.

Sept. 17, 1919.

[100 S. E. 845.]

1. Chattel Mortgages (§ 139*)—Lien; Notice of Mortgagee of Claim of Third Person.—Mortgagee in a chattel mortgage given to secure prior indebtedness, even though considered a deed of trust, acquired no lien where he had prior notice that grantor had previously executed a bill of sale to another.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 800; 10 Va.-W. Va. Enc. Dig. 43.]

2. Fraudulent Conveyances (§ 219*)—General Creditors; Sales without Delivery.—Code 1904, § 2465, providing that every bill of sale of goods and chattels, when the possession is allowed to remain with the grantor, shall be void as to subsequent purchasers for valuable consideration without notice until duly admitted to record, a creditor without a lien stands on no higher footing than his debtor, and cannot successfully invoke the benefit of the statute.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 683.]

3. Fraudulent Conveyances (§ 154 (1)*)—Retention of Possession; Failure to Record Bill of Sale.—One to whom a bill of sale of property was executed was not estopped to claim the property by reason of having failed to record the same as provided by Code 1904, § 2465, although he left the property in the hands of the prior owner and a third person extended credit to such former owner by reason of his possession and claim of ownership, there being no claim of purchaser's fraud or knowledge that third person was extending credit on faith of prior owner's continuing ownership.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 586.]

4. Fraudulent Conveyances (§ 154 (1)*)—Retention of Possession; Failure to Record Bill of Sale.—In view of Code 1904, § 2465, a landlord may acquire a lien by distress warrant, or by execution levied

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.